

PLACE: Board Hearing Room 8th Floor,
1425 K Street, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Ratification of the Board actions taken
by notation voting during the month of
September, 1985.

2. Other priority matters which may come
before the Board for which notice will be
given at the earliest practicable time.

SUPPLEMENTARY INFORMATION: Copies
of the monthly report of the Board's
notation voting actions will be available
from the Executive Secretary's office
following the meeting.

CONTACT PERSON FOR MORE

INFORMATION: Mr. Rowland K. Quinn,
Jr., Executive Secretary, Tel: (202) 523-
5920.

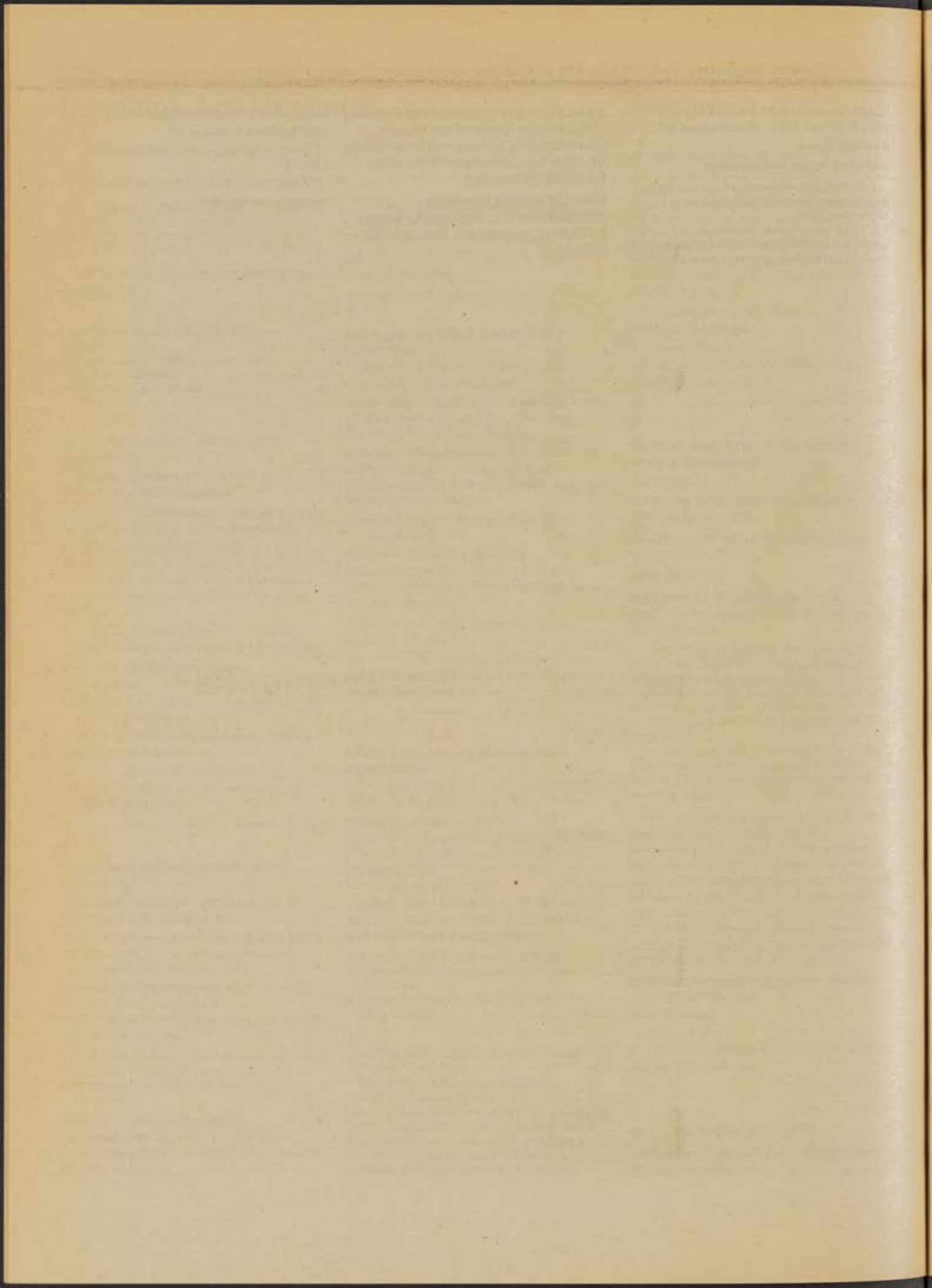
Date of Notice: September 9, 1985.

Mr. Rowland K. Quinn, Jr.,

*Executive Secretary, National Mediation
Board.*

[FR Doc. 85-22150 Filed 9-12-85; 9:38 am]

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Register

Monday
September 16, 1985

Part II

Environmental Protection Agency

40 CFR Part 300

National Oil and Hazardous Substances
Contingency Plan; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[SWH-FRL 2853-1a]

National Oil and Hazardous Substances Contingency Plan

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and Executive Order 12316, the Environmental Protection Agency (EPA) is amending § 300.66(b) of the National Contingency Plan (NCP). As amended, § 300.66(b)(4) adds a mechanism by which EPA can place sites on the National Priorities List (NPL) promulgated pursuant to section 105 of CERCLA. This section allows the EPA to list sites on the NPL under certain limited circumstances where a site would not have previously qualified but where a public health threat exists and where a Fund-financed remedial action may be warranted and more cost-effective than a removal action.

DATES: The effective date for § 300.66(b)(4) of the NCP shall be October 16, 1985.¹

ADDRESSES: The public docket for § 300.66(b)(4) of the revised NCP is located in the sub-basement of the U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, and is available for viewing from 9:00 a.m. to 4:00 p.m. Monday through Friday, excluding holidays.

FOR FURTHER INFORMATION CONTACT: Linda Garczynski, Office of Emergency and Remedial Response (WH-548 D), U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460, or telephone the RCRA/Superfund Hotline at (800) 424-9346 or in the Washington, DC area (202) 382-3000.

SUPPLEMENTARY INFORMATION:

I. Introduction

Pursuant to section 105 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9605 ("CERCLA" or "the Act") and Executive Order

12316, the Environmental Protection Agency ("EPA" or "the Agency"), on February 12, 1985, proposed revisions to the National Contingency Plan (NCP) (50 FR 5862). Section 300.66(b)(4) of these proposed revisions would expand the circumstances under which EPA can list a release on the National Priorities List (NPL) and thus make it eligible for Fund-financed remedial action. EPA provided a 30-day comment period on § 300.66(b)(4) rather than the 60-day comment period provided for the remainder of the proposed revisions of the NCP. The Agency received 18 comments during the comment period on proposed § 300.66(b)(4).

Today, the Agency is promulgating § 300.66(b)(4) of the NCP, essentially as it was proposed. The Agency has carefully considered all of the public comments submitted on § 300.66(b)(4) of the proposed revisions to the NCP. In response to the public comments, the Agency has made a clarifying change in the language of § 300.66(b)(4) and explains below how the Agency expects to use this provision of the NCP.

All significant comments on § 300.66(b)(4) and the Agency's responses to them are discussed in sections III-VIII of this notice. All other actions on the February 12, 1985, proposed revisions to the NCP will be taken in a separate rulemaking at a later date.

The Agency is also adding the Lansdowne Radiation Site in Lansdowne, PA, to the final NPL in a separate final rulemaking. The Lansdowne Site was proposed to be added to the NPL in the NPL Update #3 on the basis of proposed § 300.66(b)(4) of the NCP (50 FR 14115, April 10, 1985). At that time, the Agency stated in the preamble that EPA would not add the Lansdowne Site to the final NPL until § 300.66(b)(4) of the NCP became final.

II. Purpose of § 300.66(b)(4)

Section 105(8)(A) of CERCLA requires that the NCP include criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable, taking into account the potential urgency of such action, for the purpose of taking removal action. Removal action involves cleanup or other actions that are taken in response to emergency conditions or on a short-term or temporary basis [CERCLA section 101(23)]. Remedial action tends to be long-term in nature and involves response actions which are consistent with the permanent remedy for a release [CERCLA section 101(24)].

To be eligible for Fund-financed remedial action, a site must be listed on the NPL (40 CFR 300.68(a)). The primary purpose of the NPL is to serve as an informational tool for use by EPA in identifying sites that appear to present a significant risk to public health or the environment.

The initial identification of a site of the NPL is intended primarily to guide EPA in determining which sites warrant further investigation in order to assess the nature and extent of the public health and environmental risks associated with the site and to determine what response action, if any, may be appropriate. Inclusion of a site on the NPL does not establish that EPA necessarily will undertake response actions. Moreover, listing does not require any action of any private party, nor does it determine the liability of any party for the cost of cleanup at the site. In addition, the NPL serves as guidance to EPA in setting priorities among sites for possible response actions. Criteria for determining priorities for listing on the NPL are included in the Hazard Ranking System (HRS), which EPA promulgated as Appendix A of the NCP (47 FR 31219, July 16, 1982). A release will also be listed on the NPL if the release is designated by a State as its highest priority release (40 CFR 300.66(d)(3)).

The Agency has found that the HRS generally provides a good estimate of the relative hazards at sites for the purpose of establishing a list of national priorities for possible remedial action. The HRS total score used for the NPL is designed to take into account a standard set of factors related to the potential for harm from migration of substances through ground water, surface water, and the air. The HRS also provides an approximation of harm from direct contact with substances and from the possibility of fire and explosion. The pathway scores for direct contact and fire and explosion, however, are not considered in computing the HRS total score of a site for purposes of listing. Rather, scores from the direct contact and fire and explosion pathways are used as guidance in determining the need for removal action at a site. A site need not be on the NPL to qualify for Fund-financed removal action.

Since the direct contact scores are not included in calculating the HRS total score for purposes of listing sites on the NPL, some of the sites involving direct contact to residents, where remedial action, rather than removal action, appears necessary to address the problem, may not receive a sufficiently high HRS total score to be listed on the

¹ CERCLA section 105 provides for a legislative veto of regulations promulgated under CERCLA. Although *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764 (1983), cast the validity of the legislative veto into question, EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives. If any action by Congress calls the effective date of this regulation into question, the Agency will publish a notice of clarification in the Federal Register.

NPL to make them eligible for remedial action. There are also other circumstances where a site would not qualify for the NPL under the HRS but where a public health threat exists and where a Fund-financed remedial action may be warranted and more cost-effective than a removal action. One example is a site where a small number of people are or will be exposed to a hazardous substance. The HRS was designed so that larger exposed populations receive higher scores than smaller exposed populations.

The Lansdowne Radiation site in Lansdowne, Pennsylvania, is an example of a site that presents a significant risk to the public that may warrant remedial action, although its HRS total score is too low for the site to be included on the NPL. This site consists of a residential duplex where for approximately 20 years, beginning in the 1920's, the basement of the duplex was used by a radiochemist to manufacture radium sources for radiotherapy. In 1964, the property was decontaminated by the Pennsylvania Department of Health and the U.S. Public Health Service, and the property was certified safe for residential use. In 1984, measurements of radon and radon daughters in the indoor atmosphere of the property indicated elevated levels of radiation. The study, conducted by the Argonne National Laboratory concluded that many measurements of radon daughters exceeded EPA recommended action levels and many measurements or external gamma radiation exceeded the EPA remedial action guideline of 20 microrentgens per hour. On March 5, 1985, HHS issued a public health advisory citing that the entire duplex structure should be considered to pose a significant health risk to long-term occupants. EPA's current assessment is that remedial action (e.g., permanent relocation) as opposed to a removal action—may be the most cost-effective response that adequately protects human health and the environment. Lansdowne was proposed to be added to the NPL in the NPL Update #3 (50 FR 14115, April 10, 1985) on the basis of § 300.66(b)(4) of the proposed NCP.

EPA is promulgating § 300.66(b)(4) to address situations like those existing at the Lansdowne site. Several commenters suggested that adoption of § 300.66(b)(4) will add large numbers of sites to the NPL, resulting in a decrease in the effectiveness of CERCLA. EPA, however, intends to apply § 300.66(b)(4) to a limited number and type of sites. To qualify for inclusion on the NPL through the application of § 300.66(b)(4) as promulgated in today's rulemaking,

several criteria must be met: (1) The Agency for Toxic Substances and Disease Registry (ATSDR) must have issued a public health advisory recommending dissociation of individuals from the source of harmful exposure; (2) EPA must have determined that the potential for harm presented is significant from the standpoint of the CERCLA program; and (3) EPA anticipates that it will be more cost-effective to use remedial authority than to use removal authority to respond to the release.

The Agency intends to continue using the HRS as the decisionmaking tool for listing sites for the vast majority of the sites considered. The HRS has proven to be an effective tool for approximating the potential for harm posed by sites and, with rare exception, will remain the principal criterion for listing sites on the NPL.

In addition, EPA wants to clarify that the sites being added to the NPL pursuant to § 300.66(b)(4) would be proposed for inclusion on the NPL through the usual rulemaking process. The public will be given the opportunity to comment on the significance of the threat and each specific health advisory when a site is proposed to be added to the NPL. This will help ensure that § 300.66(b)(4) is applied in a manner consistent with CERCLA and the NCP.

III. Comments on EPA's Authority To Establish the New Listing Mechanism

Comment: Several commenters argued that EPA does not have statutory authority to list sites on the NPL on any basis other than an appropriate score under the HRS or designation as a State's top priority site.

Response: CERCLA does not require that the HRS be the exclusive method for listing sites (other than states' top priority sites) on the NPL. Section 105(8)(B) requires that a national priorities list be developed and revised, at least annually, based upon the criteria set forth in section 105(8)(A). Section 105(8)(A) lists some of the considerations that should be taken into account by EPA in compiling the list and leaves others to the Agency's discretion. Section 105(8)(A) provides:

Criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action. Criteria and priorities under this paragraph shall be based upon relative risk or danger to public health or welfare or the environment, in the judgment of the President, taking into account to the extent possible the population at risk, the hazard

potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, State preparedness to assume State costs and responsibilities, and other appropriate factors.

The Agency believes that § 300.66(b)(4) of the NCP is entirely consistent with section 105(8)(B) of CERCLA. Among other things, the additional listing mechanism allows the Agency to list a site on the basis of a public health advisory issued from ATSDR which considers, among other factors, whether there is a potential threat arising from direct contact. This is one of the factors listed in section 105(8)(A). The Agency also will consider other factors specified in section 105(8)(A) when applying § 300.66(b)(4). The inclusion of "other appropriate factors" in section 105(8)(A) indicates, moreover, that EPA was to have broad discretion in implementing that provision of the statute.

Comment: Several commenters stated that there are established criteria under the HRS for placing sites on the NPL. They believe that if the HRS is not working satisfactorily, then it should be modified.

Response: EPA believes that the HRS has proven to be an effective tool for approximating the potential for harm posed by the vast majority of sites that should qualify for Fund-financed remedial action. EPA intends § 300.66(b)(4) to cover rare situations. It is not possible for the Agency now to predict all of the circumstances in which sites that would not score high enough on the HRS would present a significant threat and warrant Fund-financed remedial action. Thus it is not feasible to modify the HRS to accommodate these situations. See Section V of this notice.

IV. Comments on the Necessity of the New Listing Mechanism

Comment: Several commenters stated that they believed this proposed additional listing mechanism to be unnecessary because EPA's existing removal authority under section 104 of CERCLA could be used to respond to these types of situations.

Response: There are certain situations where EPA's removal authority does not extend, e.g., permanent relocation cannot be performed as part of a removal response. EPA intends to use § 300.66(b)(4) to place a site on the NPL in these situations only if EPA anticipates that exercising its remedial authority will be more cost-effective

than EPA uses its removal authority to respond to the release. EPA will not use § 300.66(b)(4) to place a site on the NPL if EPA anticipates that a removal action is the most cost-effective response that adequately protects human health and the environment.

Comment: Some commenters stated that the additional listing mechanism is not necessary because the authority granted in section 106 of CERCLA may be used to respond to a release if there is an immediate and substantial endangerment. There is no requirement under CERCLA section 106 that the release be included on the NPL.

Response: The Agency agrees with the commenters that existing enforcement authorities can be used to respond to releases similar to those that would be considered candidates for listing pursuant to § 300.66(b)(4) in many situations. However, that enforcement authority may, in appropriate cases, be available does not mean that a release may not also warrant a fund-financed response. As is discussed earlier, the Agency has concluded that releases that meet the criteria of § 300.66(b)(4) should be placed on the NPL so that a fund-financed response would be available. The Agency then, in appropriate cases, would be able to choose whether a fund-financed response or an enforcement action would provide the more effective or expeditious response. Moreover, it should be noted that there are situations where existing enforcement authority is not adequate. For example, sometimes no responsible party can be found, or it may appear that a responsible party is not likely to take necessary action if a section 106 order is issued.

Comment: One commenter stated that the Resource Conservation and Recovery Act (RCRA) provides adequate authority for ensuring that releases are remedied at RCRA facilities, and that it is EPA's policy not to list RCRA facilities on the NPL. The commenter believes that the 1984 Solid Waste Disposal Act strengthens this position.

Response: EPA does not agree with the commenter's position. EPA's current policy is that where a site consists only of "regulated units" of a RCRA facility operating pursuant to a permit or interim status, it will not be included on the NPL but, to the extent possible, will be addressed under the authorities of RCRA (49 FR 40334, October 15, 1984). EPA does, however, consider eligible for listing on the NPL those RCRA facilities at which a significant portion of the release appears to come from nonregulated land disposal units of the facility, that is, portions of the facility that ceased operation prior to January

26, 1983. Regulated land disposal units of RCRA facilities generally have not been included on the NPL except where the facility is abandoned or lacks sufficient resources and RCRA corrective action could not be enforced. The new RCRA amendments [42 U.S.C. 6901-i] give the Agency considerably greater authority to respond to releases under RCRA. Therefore, the Agency has announced that it is reconsidering the current policy of listing RCRA-related sites on the NPL. [See 50 FR 14115, April 10, 1985]. Specifically, the Agency is considering deferring listing RCRA-related sites on the NPL until the Agency determines that RCRA corrective measures are not likely to succeed due to factors such as: (1) The inability or unwillingness of the owner/operator to pay for such actions; (2) the inadequacies of the financial responsibility guarantees to pay for such costs; or (3) the Agency or State priorities for addressing the sites under RCRA. The Agency has not yet decided whether to modify its existing policy with respect to listing RCRA-related sites.

Since current EPA policy does not preclude the listing of RCRA related sites that are regulated units, EPA will apply the current policy in deciding whether to use § 300.66(b)(4) to add such sites to the NPL. If EPA alters this policy after it considers comments received on the April 10, 1985, Federal Register discussion of options for a deferred listing policy for RCRA related sites, any such new policy could be applied to sites listed pursuant to § 300.66(b)(4).

V. Comments on the Lack of Explicit Standards and Procedures for Health Advisories

Comment: Many of the commenters oppose the use of health advisories as a basis for adding sites to the NPL. The commenters requested clarification of (1) the criteria for determining whether a health advisory should be issued; (2) the health advisory issuance process including opportunities for public review and comment; and (3) which office within HHS would be involved in issuing public health advisories. The commenters were concerned that the lack of criteria for issuing health advisories would give EPA unbounded discretion to avoid using the HRS.

Response: EPA has consulted with ATSDR of HHS on this comment and believes, based on its advice from ATSDR, that the wide variety of considerations which, of necessity, must be taken into account in deciding whether to issue a public health advisory precludes the development of specific criteria. Instead, ATSDR bases

its issuance of public health advisories on a case-by-case application of best medical judgment. In response to these comments, however, the Agency has limited the applicability of § 300.66(b)(4) to situations in which the public health advisory recommends disassociation of individuals from the release.

To date, there have been over 200 health assessments conducted by ATSDR at Superfund sites. Out of these health assessments only 39 have resulted in the issuances of public health advisories. Of the 39 public health advisories issued, very few recommend disassociation of an individual from the release. This illustrates that the potential number of sites qualifying under the first criterion of § 300.66(b)(4) is small.

In response to the comment concerning the opportunities for public review and comment on the public health advisory, EPA wants to clarify that the public will be given the opportunity to comment on each specific public health advisory when the site is proposed to be added to the NPL. The sampling data gathered by EPA or other lead agencies upon which the issuance of a public health advisory may be based, will be available to the public.

In response to the comment that EPA clarify which office within HHS would be involved in issuing a public health advisory, EPA has added language to § 300.66(b)(4) saying that ATSDR will be the agency within HHS responsible for issuing the public health advisories.

VI. Comments on the Lack of Guidelines for Determining What Releases Pose a Significant Threat

Comment: The Agency received several comments requesting EPA to clarify the meaning of the phrase "significant threat" to public health. Specifically, they requested clarification of the language to specify (1) the factors to be considered in evaluating whether a threat is significant; (2) the role quantitative assessment plays in determining whether a threat is significant and (3) the procedures for determining whether a significant threat exists. One commenter suggested that the threshold be changed from significant threat to "imminent and substantial" threat.

Response: Section 300.66(b)(4) gives EPA the discretion to determine whether a release for which ATSDR has issued a public health advisory is of sufficient priority to be included on the NPL. The issuance of a public health advisory does not, by itself, qualify a release for inclusion on the NPL. A threat may be significant for purposes of ATSDR to

issue a public health advisory, but not for purposes of the response programs under CERCLA. Until the Agency has had more experience with situations which may be candidates for listing pursuant to § 300.66(b)(4), it is not possible to indicate all the situations in which EPA will decide that a threat is significant for purposes of § 300.66(b)(4). In general, however, EPA intends to apply § 300.66(b)(4)(2) only in situations where the release meets the threshold required for taking a removal action.

In response to the comment regarding the role of quantitative assessment, EPA does not intend to use quantitative risk assessments to evaluate sites for possible application of § 300.66(b)(4). The Agency believes the quantitative risk assessment is not necessary to list sites on the NPL nor would adequate data be available for a quantitative assessment at the time of listing. Additional data may be collected during the investigatory stage of work conducted at the site, and in some cases, the Agency may perform a quantitative risk assessment prior to selection of the remedy.

EPA does not agree that § 300.66(b)(4) should apply only where EPA makes a finding that there is an imminent and substantial threat. Where the three criteria are met, EPA has the authority to list a site on the NPL and to take remedial actions. As is discussed earlier, EPA does not believe that many sites will meet the three criteria of § 300.64(b)(4).

VII. Extension of the Listing Mechanism Beyond Public Health Concerns

Comment: Several commenters expressed approval of the additional listing criteria but suggested that EPA extend the listing mechanism beyond strictly public health concerns to embrace environmental threats as well. They did not want to limit EPA's authority to list on the NPL pursuant to § 300.66(b)(4) situations where HHS issues a public health advisory. One commenter proposed that § 300.66(b)(4) be expanded to enable the Agency to include on the NPL any release that poses "a significant threat to a sensitive ecosystem or the human food chain." On the other hand, EPA received several comments suggesting that this new listing method be limited to releases at which health, not welfare or the environment is threatened, since the additional listing criteria focuses on public health advisories.

Response: EPA intends that the HRS remain the primary mechanism for listing sites on the NPL. The HRS considers environmental factors such as sensitive ecosystems. The Agency sees

no need to expand § 300.66(b)(4) to include sensitive ecosystems and food chain exposure; and these issues are unrelated to this rulemaking. The Agency is examining whether the HRS should include additional provisions for food chain exposure, but has not decided what changes, if any, are appropriate.

VIII. Other Comments

Comment: EPA received several comments requesting that they clarify whether EPA may act only when a public health advisory has been issued or whether EPA may make an independent finding of threat to public health.

Response: § 300.66(b)(4) has been changed to clarify that in order for the additional listing criteria to be applied, ATSDR must have issued a public health advisory which recommends dissociation of individuals from the release. In addition, EPA must make a determination that the release is a significant threat to public health and that taking a remedial action is more cost-effective than a removal action.

Comment: Several commenters argued that this additional listing mechanism should be applied only to hazardous waste sites. They asserted that Fund resources should not be used to respond to sites not involved in hazardous waste releases such as asbestos and pesticide sites because it would be diverting resources away from the primary purpose of CERCLA—the cleanup of abandoned or inactive waste sites.

Response: CERCLA does not limit response to hazardous waste sites, and the Agency does not believe that it would be appropriate to so limit § 300.66(b)(4). ATSDR may issue public health advisories with respect to other releases, and the threats posed may be significant and warrant national response. If a commenter believes that a particular release that is proposed for listing on the NPL would not merit a fund-financed response because of other, more urgent CERCLA priorities, these concerns should be raised as comments on the proposed listing. As noted earlier, EPA in general, intends to limit the use of § 300.66(b)(4) to categories of sites that are most appropriately addressed under CERCLA.

Comment: Several commenters stated that inclusion of sites on the NPL brings into play the more expensive and time consuming remedial investigation/feasibility study (RI/FS) process. This could create delays and needless expense at the sites that are listed pursuant to § 300.66(b)(4).

Response: Whenever the Agency lists a release on the NPL under § 300.66(b)(4), it may, as it may for any other release listed on the NPL, undertake whatever response actions are appropriate for the release, removal as well as remedial. The Agency is free to undertake removal actions in response to the release while it considers the appropriate remedial measure. To the extent the removal action would eliminate the need for further response actions, the site would not meet the criteria established by § 300.66(b)(4). In planning remedial actions, the Agency may use "operable units." An operable unit is a discrete response measure that is consistent with a permanent remedy, but is not the permanent remedy in and of itself. This concept entails the practice of phasing remedial action at sites that present complex cleanup problems. For example, it is often appropriate first to conduct a surface cleanup of a site, and then, after additional analysis of more complex hydrogeological factors, to select and implement remedial measures addressing ground-water contamination.

Comment: Several commenters stated that States have their own hazardous waste laws and are capable of responding to a small but dangerous release that does not warrant national prioritization.

Response: While some States may have adequate resources and authority to respond to sites listed under § 300.66(b)(4), not all States have adequate laws or resources to cover these situations. In addition, State laws vary. Thus, EPA does not wish to rely solely on the States to take remedial action at sites that meet the criteria of § 300.66(b)(4) and thus listing of these sites is appropriate for all States.

Comment: One commenter claimed that few benefits, if any, would be derived from the adoption of this proposed rule, and on the other hand, it will have adverse impacts on persons associated with listed sites. NPL listing may, for example, effectively "down-zone" property, decrease property value, prohibit development, require disclosure in auditors' statements, etc.

Response: The purpose of the NPL which has been discussed at length in earlier Federal Register notices (e.g., 50 FR 14116, April, 10, 1985), is to identify sites that warrant further investigation and possible remedial action. Listing does not require any action for any private party, nor does it impose any liability on any party for the cost of cleanup at the sites. It is possible that EPA may conclude that it is not desirable to conduct response action at

some sites on the NPL because of more pressing needs at other sites.

Comment: Several commenters urged that EPA and ATSDR be responsive to input and recommendations from the State. In particular, a commenter wanted to know if health advisories issued by State Departments of Health will have the same impact as ATSDR's public health advisories.

Response: States will have an opportunity to comment on each release when it is proposed to be added to the NPL. EPA will consider all comments received from States during the comment period.

The Agency believes that in order to assure national consistency in implementing § 300.66(b)(4), public health advisories issued by State Departments of Health cannot be used, in lieu of public health advisories issued by ATSDR, to invoke the § 300.66(b)(4) listing mechanism. States can, however, recommend to ATSDR they issue a public health advisory.

IX. Summary of Supporting Analyses

A. Classification Under E.O. 12291

Regulations must be classified as major or nonmajor to satisfy the rulemaking protocol established by Executive Order 12291. E.O. 12291 establishes the following criteria for a regulation to qualify as a major rule:

1. An annual effect on the economy of \$100 million or more;

2. A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or

3. Significant adverse effects on competition, employment, investment, productivity, innovation, or on the enterprises to compete with foreign-based enterprises in domestic or export markets.

Section 300.66(b)(4) of the NCP is a nonmajor rule because it would have no significant incremental economic effects. Placing sites on the NPL does not impose any costs directly. The proposed listing of sites on the NPL does not in itself require any action of any private party, nor does it determine the liability of any party for the cost of cleanup at the site. As a consequence, it is hard to predict impacts on any group. A site's

inclusion on the NPL could increase the likelihood that adverse impacts to responsible parties (in the form of cleanup costs) will occur, but EPA cannot identify the potentially affected businesses at this time nor estimate a number of small businesses that might be affected. This regulation was submitted to OMB for review under Executive Order 12291.

B. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act of 1980, Agencies must evaluate the effects of a regulation on "small entities." That Act recognizes three types of such entities:

1. Small businesses (specified by Small Business Administration regulations);

2. Small organizations (independently owned, nondominant in their field, nonprofit); and

3. Small governmental jurisdictions (serving communities with fewer than 5,000 people).

If the rule is likely to have a "significant impact on a substantial number of small entities," the Act requires that a Regulatory Flexibility Analysis be performed. The Agency does expect that certain industries and firms within industries that have caused a proportionately high percentage of waste site problems could be significantly affected by CERCLA actions. However, EPA does not expect the impacts from the listing of sites under this section to have a significant economic impact on a substantial number of small businesses.

C. Paperwork Reduction Act

Today's final rule on § 300.66(b)(4) does not impose any regulatory burden on parties outside of EPA, including any reporting or information collection requirements.

List of Subjects in 40 CFR Part 300

Air pollution control, Chemicals, Hazardous materials, Hazardous substances, Intergovernmental relations, National resources, Occupational safety and health, Oil pollution, Reporting and record-keeping requirements, Superfund, waste treatment and disposal, Water pollution control, Water supply.

Dated: August 14, 1985.

Lee M. Thomas,
Administrator.

For the reason set forth in the preamble, Part 300, Subpart J, Chapter I of Title 40, Code of Federal Regulations is amended as follows:

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

1. The authority citation for Part 300 continues to read as follows:

Authority: Sec. 105 Pub. L. 96-510, 94 Stat. 2704, 42 U.S.C. 9605; Sec. 311(c)(2), Pub. L. 92-500 as amended, 86 Stat. 865, 33 U.S.C. 1321(c)(2); E.O. 12316, 46 FR 42237; E.O. 11735, 38 FR 21243.

Subpart F—Hazardous Substance Response

2. In 40 CFR Part 300, § 300.66 is amended by revising paragraph (b) to read as follows:

§ 300.66 Site evaluation phase and national priorities list determination.

(b) Methods for Establishing Priorities. As soon as practicable, an inspection will be undertaken to assess the nature and extent of the release and to assist in determining its priority for Fund-financed response.

(1)–(3) [Reserved]

(4) In addition to those release whose HRS scores qualify them for the NPL, EPA may include on the NPL any other release if (i) the Agency for Toxic Substances and Disease Registry of Health and Human Services has issued a public health advisory which recommends dissociation of individuals from the release; (ii) the EPA determines that the release poses a significant threat to public health; and (iii) EPA anticipates that it will be more cost-effective to use its remedial authority than to use removal authority to respond to the release.

[FR Doc. 85-21138 Filed 9-13-85; 8:45 am]

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Federal Register

Monday
September 16, 1985

Part III

**Environmental
Protection Agency**

40 CFR Part 300
Amendment to National Oil and
Hazardous Substances Contingency Plan:
National Priorities List; Final Rule

ENVIRONMENTAL PROTECTION
AGENCY

40 CFR Part 300

[SWH-FRL 2853-16]

Amendment to National Oil and
Hazardous Substances Contingency
Plan: National Priorities ListAGENCY: Environmental Protection
Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency ("EPA") is amending the National Oil and Hazardous Substances Contingency Plan ("NCP"), which was promulgated on July 16, 1982, pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") and Executive Order 12316. This amendment revises the National Priorities List ("NPL"), which initially was promulgated as Appendix B of the NCP on September 8, 1983, by adding the Lansdowne Radiation site located in Lansdowne, Pennsylvania to the final NPL. CERCLA requires that the NCP include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, and contaminants throughout the United States, and that the list be revised at least annually. The NPL constitutes this list and meets those requirements. The Lansdowne site is being added to the NPL because the site meets the eligibility requirements of the NPL. EPA has included on the NPL releases and threatened releases of designated hazardous substances as well as "pollutants or contaminants" which may present an imminent and substantial danger to the public health or welfare. Inclusion of the Lansdowne site on the NPL makes this site eligible for Fund-financed remedial actions as specified in § 300.68(a) of the NCP.

DATE: The effective date for this amendment to the NCP shall be October 16, 1985.¹

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SUPPLEMENTARY INFORMATION:

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I. Background of the NPL

Pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. sections 9601-9657 ("CERCLA or the Act"), and Executive Order 12316 (46 FR 42237, August 20, 1981), the Environmental Protection Agency ("EPA" or "the Agency") promulgated the revised National Contingency Plan ("NCP"), 40 CFR Part 300, on July 16, 1982 (47 FR 31180). Those amendments to the NCP implemented responsibilities and authorities created by CERCLA to respond to releases and threatened releases of hazardous substances, pollutants, and contaminants.

Section 105(8)(A) of CERCLA requires that the NCP include criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable, taking into account the potential urgency of such action, for the purpose of taking removal action. Removal action involves cleanup or other actions that are taken in response to releases or threats of releases on a short-term or temporary basis (CERCLA section 101(23)). Remedial action tends to be long-term in nature and involves response actions which are consistent with a permanent remedy for a release (CERCLA section 101(24)).

Section 105(8)(B) of CERCLA requires that these criteria be used to prepare a list of national priorities among the known releases of threatened releases throughout the United States, and that to the extent practicable, at least 400 sites be designated individually on the National Priorities List (NPL). Section 105(8)(B) also requires that the list of priorities be revised at least annually. EPA has included on the NPL releases and threatened releases of designated hazardous substances as well as "pollutants or contaminants" which may present an imminent and substantial danger to the public health or welfare. CERCLA requires that the NPL be included as part of the NCP. An initial NPL of 406 sites was promulgated on September 8, 1983, (48 FR 40658). The

NPL has been amended several times since then. On May 8, 1984, EPA amended the NCP by adding four sites in San Gabriel, California, to the NPL. On September 21, 1984, EPA further amended the NCP by adding 128 sites to the NPL (49 FR 37070), and deferred final rulemaking on four sites. The second proposed update was published in the Federal Register on October 15, 1984 (49 FR 40320). The second update proposed the addition of 244 sites, two of which were promulgated in the Federal Register on February 14, 1985 (50 FR 6320). In addition, the third update proposed 26 sites on April 10, 1985 (50 FR 14115). Today's final rulemaking action adds to the NPL the Lansdowne Radiation site, Lansdowne, Pennsylvania, which was proposed on April 10, 1985 (50 FR 14115). This action is taken pursuant to § 300.68(b)(4) of the NCP which is promulgated in a separate notice in today's Federal Register.

Additional discussion on the purpose and development of the NPL and on generic issues relating to the HRS are included in the preambles to the NPL promulgated on September 8, 1983 (48 FR 40658), and amended on September 21, 1984 (49 FR 37070). Section 300.68(a) of the NCP reserves Fund-financed remedial action for sites on the NPL. Inclusion of a site on the NPL is not necessary for other types of response actions such as removal actions or enforcement actions. Moreover, a site need not be on the NPL to be the subject of a private party cost recovery action pursuant to section 107(a)(4)(B) of CERCLA.

The principal criteria used by the Agency for determining site eligibility for inclusion on the NPL are included in the Hazard Ranking System (HRS) which EPA promulgated as Appendix A of the NCP (47 FR 31219, July 16, 1982). The HRS total score used for the NPL is designed to take into account a standard set of factors related to risks from migration of substances through groundwater, surface water, and air. At present, sites whose scores are 28.50 or above are eligible for the NPL.

Section 300.68(b)(4) of the NCP has been amended to allow some sites that do not score 28.50 or greater to be added to the NPL. These sites may qualify for the NPL if: (1) The Agency for Toxic Substances and Disease Registry of the U.S. Department of Health and Human Services (ATSDR) has issued a health advisory which recommends dissociation of individuals from the release; (2) the Agency determines that the release poses a significant threat to public health; and (3) EPA anticipates that it will be more cost-effective to use

¹ CERCLA section 305 provides for a legislative veto of regulations promulgated under CERCLA. Although *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983), cast the validity of the legislative veto into question, EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives. If any action by Congress calls the effective date of this regulation into question, the Agency will publish a notice of clarification in the Federal Register.

remedial authority than if EPA uses its removal authority to respond to the release. The Agency has determined that the Lansdowne site meets these three criteria as described in Section II below.

II. Background of the Lansdowne Radiation Site, Lansdowne, Pennsylvania

The Lansdowne Radiation site located in Lansdowne, Pennsylvania, was included in the proposed rulemaking for Update #3 of the NPL (50 FR 14115, April 10, 1985). The Lansdowne site consists of a residential duplex structure situated on a 0.5 acre lot in a residential area. The basement of the residence at 105 E. Stratford Avenue was used from 1924-1944 by a chemistry/physics professor to manufacture radium sources for medical radiation therapy. In mid-1983, EPA and the Pennsylvania Department of Environmental Resources, Office of Radiation Programs identified the Lansdowne site as suitable for inspection. Since that time, several radiological studies of the site have been completed.

The first of these studies was conducted in June of 1984 by EPA and State of Pennsylvania Department of Environmental Resources (PADER). Results revealed levels of gamma radiation ten times above the level to which the general population is exposed, and levels of radon daughters one hundred times higher than background levels.

In September, 1984, EPA and the Federal Emergency Management Agency, as part of a CERCLA-funded immediate removal, temporarily relocated the two residents living in the structure. EPA Region III recognized that a permanent solution would far exceed the six month, \$1 million limit on immediate removal, and requested a time extension for relocation pursuant to Part 300.65(d)(3) of the NCP.

In the Fall of 1984, the Argonne National Laboratory conducted a survey of the structure to determine levels of radon gas and gamma radiation. Data revealed that all interior measurements of radon daughters exceeded the EPA recommended action level of 0.02 Working Levels (WL). In addition, most interior measurements of gamma radiation exceeded the EPA remedial action guideline of 20 microroentgens/hour above background.

ATSDR reviewed the results of the two above mentioned studies, and on March 5, 1985 issued a health advisory warning that environmental measurements of radon daughters and gamma radiation inside the duplex dwelling indicated exposure levels in

excess of those ATSDR considered safe for human habitation. The advisory recommended dissociation of exposed individuals from the structure.

Inhalation of radon gas and its decay products exposes the lungs to alpha radiation, thereby increasing the chances of developing lung cancer. Both radon and its decay products readily adhere to particulate matter, and can be entrained in dust when disturbed, increasing the potential for ingestion, particularly by children. Moreover, the site poses a potential threat of release to the surrounding community which would be particularly severe if a fire occurred. EPA has installed a sprinkler system in the house to temporarily reduce the threat of fire, but believes this is an acceptable solution only for the short term.

In December of 1984, the Argonne Laboratory collected soil samples from the property at 105-107 E. Stratford Avenue. Results of this sampling revealed that radioactive material has migrated beyond the property boundary. Samples were also collected from the off-site sewer. Preliminary data indicated the presence of radioactive materials in the sanitary sewer beneath E. Stratford Avenue.

EPA considers the risks posed by this site to be significant. EPA has also determined pursuant to § 300.66 (b)(4) that a remedial approach to this situation will provide the lowest cost alternative which effectively mitigates and minimizes damage to, and provides adequate protection of, public health. EPA views the complete removal of the house from the surrounding residential community as the only appropriate way to permanently ameliorate this significant health hazard.

III. Addition of the Lansdowne Radiation Site, Lansdowne, Pennsylvania to the NPL

The action being taken today will add the Lansdowne Radiation site in Lansdowne, Pennsylvania to the NPL. EPA received comments from five parties regarding Lansdowne during the 30-day comment period which ended May 10, 1985. EPA has reviewed the comments addressed below and has determined that no new information has come to the Agency's attention during the comment period that would change EPA's decision to include this site on the NPL.

Several commenters objected to EPA's listing a site on the NPL using a procedure which they perceived as having not yet been promulgated.

The Agency has promulgated an amendment to § 300.66(b)(4) of the NCP which provides EPA with a new

mechanism for including releases on the NPL irrespective of their HRS scores, when specific criteria are met (see Section II of the § 300.66(b)(4) preamble published elsewhere in today's *Federal Register*). Sites may be added to the NPL based on this amendment if, as is true at Lansdowne, a small number of people are or will be exposed to hazardous substances through one of several routes of exposure.

One commenter concluded that no immediate threat to public health exists at the site.

EPA disagrees with the commenter's assessment of the public health hazards associated with the site. A detailed explanation of the public health concerns associated with the site is provided in Section II of this preamble.

One commenter agrees with EPA's decision to relocate the occupants of the home, and believes that the security measures (sprinkler system, alarm, fence) are adequate to mitigate any immediate threat until EPA has considered public comment on the February 12, 1985 proposed amendments to the NCP.

EPA has considered comments received regarding the February 12, 1985 proposed NCP amendments and has promulgated § 300.66(b)(4) of the NCP in a separate notice of today's *Federal Register*. EPA sees no reason to delay permanently remedying this public health threat.

One commenter stated that the cost estimate for remedial action at Lansdowne is unjustifiably high.

EPA's preliminary cost estimate for remedial action at the site is approximately \$3.5 million. This cost estimate includes dismantling and packing the structure, transport to an acceptable disposal facility, disposal costs, monitoring, and financial reimbursement to the owners of the house. EPA views the complete removal of the house from this residential area as the only appropriate way to permanently ameliorate this significant health hazard, and believes the costs are not excessive.

One commenter suggested that the cleanup of contaminated residences is an inappropriate use of CERCLA. The commenter stated that CERCLA is primarily an inactive waste site cleanup program. The commenter felt that by diverting its focus away from hazardous waste site cleanup, EPA would not only divert scarce CERCLA management and legal resources, but it could also put an intolerable drain on Fund resources.

EPA believes that neither CERCLA nor the Hazardous Ranking System limits response to hazardous waste

sites, and it would be inappropriate to so limit § 300.66(b)(4). ATSDR may issue advisories with respect to other releases, and the threats posed may be significant and warrant national response. EPA does not expect that the amendment to § 300.66(b)(4) of the NCP will result in a substantial re-direction of CERCLA resources. In particular, the Agency does not foresee using substantial portions of the CERCLA Trust Fund to clean up private residences. Few sites are expected to be added to the NPL pursuant to § 300.66(b)(4), and not all sites listed pursuant to § 300.66(b)(4) will be residences. But where, as is the case of the Landsdowne Radiation site, releases at residences threaten both inhabitants and the surrounding community, the Agency believes it appropriate to consider them candidates for fund-financed remedial action. As the commenter notes, CERCLA's authority is very broad and can extend to residences.

One commenter compared the situation at Landsdowne to that of the approximately 733,000 asbestos-contaminated buildings in the United States, and stated that responding to this analogous situation could dwarf the program for hazardous waste sites. The commenter asserted that listing the Landsdowne site would be inconsistent with the following statement in EPA's CERCLA 301(a)(1)(c) study: "EPA's current policy is that the Agency will not respond to air releases within buildings. However, if EPA were to make a policy change to address such indoor releases, this would significantly affect the number of sites to which Superfund responds."

As previously stated, EPA does not expect that the amendment to § 300.66(b)(4) will result in a substantial re-direction of CERCLA Trust Fund monies from hazardous wastes sites to private residences. In addition, the quotation from the study was taken out of context. The sentences were contained in a paragraph which discussed asbestos inside schools and other buildings. It did not address situations in which indoor releases present threats or potential threats to the ambient atmosphere, as in the case of Landsdowne.

One commenter stated that Congress intended the Superfund petrochemical feedstock tax structure to reflect some relationship between "front-end" chemicals taxed and their fate of ending up at waste sites. The commenter further added "that Congress had no

radiation-contaminated residence nexus in mind when designing the tax."

As discussed previously, the Agency believes it has the authority to respond to sites at which releases of radiation present a threat to public health and the environment, unless those releases are expressly excluded by the statutory language. The Landsdowne site does not fit within any of the statutory exclusions.

Several commenters resubmitted comments regarding amendments to § 300.66(b)(4) of the NCP as they would apply to the Landsdowne site. The comments are summarized below, and responses are provided in the preamble to the promulgation of § 300.66(b)(4) of the NCP.

- The commenters opposed the procedure used to list the Landsdowne site. The commenters believed that the use of a health advisory as the basis for listing a site is premature and inappropriate because the term health advisory has not been defined, nor do any criteria for the issuance of health advisories exist. The commenters felt that this would lead to § 300.66(b)(4) being used to address any of a number of sites beyond those where a significant health risk to a small number of individuals exists.

- Although the commenter supports EPA's efforts to address a small number of seriously threatened individuals, the commenter felt that EPA already possesses statutory authority to respond to imminent hazards under section 106 of CERCLA.

- The commenter stated that the term "HHS health advisory" requires clarification. The commenter further stated that neither the proposed regulations nor the preamble defines the term, nor do they provide any guidance as to what constitutes a "significant" threat to public health.

- The commenter suggested that the NCP regulations should specify which office of HHS is charged with issuing health advisories for the purpose of adding sites to the NPL.

IV. Regulatory Impact

The addition of this site to the final rulemaking of the NPL does not meet the Executive Order 12991 definition of the term "major rule."

The purpose of the NPL is primarily to serve as an informational tool for use by EPA in identifying sites that appear to present a significant risk to public health or the environment. The initial identification of a site on the NPL is intended primarily to guide EPA in determining which sites warrant further investigation designed to assess the

nature and extent of the public health and environmental risks associated with the site and to determine what response action, if any, may be appropriate. Inclusion of a site on the NPL does not establish that EPA necessarily will undertake response actions. Moreover, listing does not require any action of any person, nor does it determine the liability of any person for the cost of cleanup at the site.

The information collected to support selecting a site for the NPL is not sufficient in itself to determine the appropriate remedy for a particular site. EPA generally relies on further, more detailed studies conducted at the site to determine what response, if any, is appropriate. Decisions on the type and extent of action to be taken at this site will be made on the basis of such studies and in accordance with the criteria contained in Subpart F of the NCP.

A full assessment of the cost of remedial action at the Landsdowne site has not been completed, but preliminary cost estimates are approximately \$3.5 million. Thus, the possible remedial action will not cause an annual effect on the economy of \$100 million or more. It is not expected that remedial action will cause a major increase in costs or prices, nor will it have significant adverse effects on competition, employment, investment or any other criteria of Executive Order 12291. Rather, beneficial effects are anticipated from any actions taken to reduce exposures, from radon daughters and gamma radiation.

V. Regulatory Flexibility Act Analysis

After reviewing the criteria for significant economic impact on substantial numbers of small entities as defined by the Regulatory Flexibility Act, EPA has determined that listing does not require any action of any private party for the cost of cleanup at the site. Currently, EPA and the State of Pennsylvania expect to fund remedial activities at the site. It is unlikely that any EPA remedial activities at this site would significantly affect a substantial number of small business entities.

List of Subjects in 40 CFR Part 300

Air pollution control, Chemicals, Hazardous materials, Intergovernmental relations, Natural resources, Oil pollution, Reporting and Recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Dated: August 14, 1985.

Lee M. Thomas,
Administrator.

PART 300—[AMENDED]

1. The authority citation for Part 300 continues to read as follows:

Authority: Sec. 105 Pub. L. 96-510, 94 Stat. 2764, 42 U.S.C. 9605; Sec. 311(c)(2), Pub. L. 92-500 as amended, 86 stat. 865, 33 U.S.C. 1321(c)(2); E.O. 12316, 46 FR 42237; E.O. 11735, 38 FR 21243.

Appendix B—[Amended]

2. The National Priorities List, which is Appendix B of the National Oil and Hazardous Substances Pollution Contingency Plan, is hereby amended to add the following site as the last item in Group 9 of the non-Federal portion of the NPL.

Appendix B—National Priorities List

Group 9	EPA Reg.	State	Site Name ¹	City/ county	Response status ²			
					V	R	E	D
03	PA	Lansdowne Radiation Site	Lansdowne		R			

¹ States¹ designated top priority sites.

² Response status:

V—Voluntary or negotiated response.

R—Federal and State Response.

E—Federal and State enforcement.

D—Actions to be determined.

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